

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS, LLC, *et al.*,

Plaintiffs,

v.

VIMEO, LLC d/b/a VIMEO.COM, *et al.*,

Defendants.

CASE NO. 09 CV 10101 (RA)

EMI BLACKWOOD MUSIC, INC., *et al.*,

Plaintiffs,

v.

VIMEO, LLC d/b/a VIMEO.COM, *et al.*,

Defendants.

CASE NO. 09 CV 10105 (RA)

DECLARATION OF
DAE MELLENCAMP

I, Dae Mellencamp, declare as follows:

1. I am currently the President of Vimeo, LLC.¹ I have held this position since March 2012. Prior to that time, I was, with different titles, the chief officer responsible for managing Vimeo, a role I held since January 2009. In the course of my duties, I have become familiar with Vimeo's products and services, its Terms of Service, and its copyright-related practices. I submit this declaration in support of Defendants' Motion for Summary Judgment. I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify competently to them.

¹ For simplicity, for the remainder of this Declaration I refer to both the Vimeo, LLC business entity (and predecessors) and the Vimeo service (available through <http://vimeo.com>) as "Vimeo" unless otherwise noted.

The Vimeo Service

2. Vimeo owns and operates the video-sharing website located at <http://vimeo.com>. Vimeo hosts and distributes “user-generated content.” This means that Vimeo users may, among other things, upload, share, and view original videos that they created. Vimeo users may also interact with one another and comment on others’ videos.

3. Vimeo is focused on hosting original, high-quality, user-generated content. It provides a place where individuals from around the world can connect with, and be inspired by, other users who share a wide variety of passions. In particular, Vimeo has become an online destination for filmmakers who want to share their creative works and personal moments.

4. Vimeo has received numerous accolades. *Time* magazine listed Vimeo as one of the world’s top 50 websites for 2009 and 2010. Over the years, Vimeo has won several “Webby” awards, which celebrate the best of the Internet, including Overall Winner and People’s Voice Winner in the “Social Media” category in 2011. Vimeo is one of the top 130 most-visited websites in the world and recently became one of the top ten online distributors of video on the Internet. In terms of websites that focus on user-generated videos, Vimeo is second only to YouTube in popularity.

5. The videos hosted on Vimeo are incredibly diverse. They include personal home videos as well as animation, documentaries, independent films, inspirational works, shorts, slow-motion films, time-lapse videos, and split screen films, among many, many others. Videos range from clips that last only a few seconds to feature-length films. Vimeo has registered users in 49 different countries. U.S. traffic accounts for only about one-third of Vimeo’s overall traffic. Vimeo is currently offered in English and Spanish.

6. Vimeo has its share of well-known users, including accounts associated with the White House (<http://vimeo.com/whitehouse>), *The New York Times* (<http://vimeo.com/nytimes>), the Metropolitan Museum of Art (<http://vimeo.com/metmuseum>), the New York City Ballet (<http://vimeo.com/nycballet>), and the NASA Lunar Science Institute (<http://vimeo.com/nlsi>). Several prominent media and entertainment organizations have officially partnered with Vimeo, including CNN (<http://vimeo.com/cnn>) and Paramount Pictures (<http://vimeo.com/paramountpictures>).

7. Many Vimeo accounts report to be associated with educational institutions, including Yale Law School (<http://vimeo.com/yalelaw>), Cornell University (<http://vimeo.com/ecornell>), Dartmouth University (<http://vimeo.com/user2384236>), <http://vimeo.com/thedartmouth>), Georgetown University (<http://vimeo.com/georgetown>), Harvard Law School (<http://vimeo.com/harvardlawdocs>), Northwestern University (<http://vimeo.com/user2609326>), the University of Pennsylvania (<http://vimeo.com/user3786351>), Stanford University (<http://vimeo.com/stanfordalumni>), and Texas A&M (<http://vimeo.com/tamus>), among others.

8. Many prominent political and public organizations also use Vimeo, including the Republican Governors Association (<http://vimeo.com/repgovs>), the American Israel Public Affairs Committee (<http://vimeo.com/aipac>), the National Veterans Memorial (<http://vimeo.com/user2848291>), Governor of Alaska Sean Parnell (<http://vimeo.com/alaskagov>), U.S. Senator of Hawaii Dan Inouye (<http://vimeo.com/daninouye>) and Pennsylvania State Senator Dave Argall (<http://vimeo.com/senatorargall>).

9. Many Vimeo accounts report to be associated with the entertainment industry, including prominent filmmakers such as Academy Award-nominated director Jason Reitman

(<http://vimeo.com/user2922741>), Emmy Award- and Sundance Film-winning filmmaker Andrew Young (<http://vimeo.com/archipelagofilms>), Emmy Award-winning documentary filmmaker Anthony Giacchino (<http://vimeo.com/user2686410>), and Emmy Award-winning journalist Travis Fox (<http://vimeo.com/travisfox>). Similarly, many Vimeo accounts report to be associated with prominent musicians, including Josh Groban (<http://vimeo.com/user604934>), Phish (<http://vimeo.com/phish>), Katy Perry (<http://vimeo.com/user372736>), Gotye (<http://vimeo.com/gotye>), “Weird Al” Yankovic (<http://vimeo.com/weirdal>), and Van Halen (<http://vimeo.com/vanhallen>).

10. Many Vimeo accounts report to be associated with entertainment and music companies, including Warner Bros. Records (<http://vimeo.com/wbrvideo>), Sony Music Entertainment Sweden (<http://vimeo.com/sonymusicsweden>), Merge Records (<http://vimeo.com/mergerecords>), and Revelation Records (<http://vimeo.com/revelation>).

11. Many Vimeo accounts report to be associated with musicians or artists who I understand have sound recordings or musical compositions owned or controlled by Plaintiffs or other entities in the EMI family, including ABANDON (<http://vimeo.com/abandon>), Ben Harper (<http://vimeo.com/benharper>), Beyoncé (<http://vimeo.com/beyonce>), The Bird and the Bee (<http://vimeo.com/thebirdandthebee>), Christy Nockels (<http://vimeo.com/christynockels>), Coldplay (<http://vimeo.com/coldplayyalpdloc>), The Decemberists (<http://vimeo.com/thedecemberists>), Depeche Mode (<http://vimeo.com/depechemode>), Erika Heynatz (<http://vimeo.com/user3178394>), Future of Forestry (<http://vimeo.com/futureofforestry>), JAIKO (<http://vimeo.com/jaicko>), Katy Perry (<http://vimeo.com/user372736>), LCD Soundsystem (<http://vimeo.com/lcdsoundsystem>), Marit Larsen (<http://vimeo.com/maritlarsen>), Miami Horror (<http://vimeo.com/miamihorror>) OK Go

(<http://vimeo.com/user2495615>), Papa Vs Pretty (<http://vimeo.com/papavspretty>), The Postelles (<http://vimeo.com/thepostelles>), Right Said Fred (<http://vimeo.com/rightsaidfred>) and Sigur Rós (<http://vimeo.com/sigurros>). In addition, EMI Music Norway appears to be associated with a Vimeo account (<http://vimeo.com/emino>) that published videos containing music.

12. Artists have also used Vimeo to premiere works. For example, Beyoncé’s 2010 video “Why Don’t You Love Me” had its world premiere and a prior “sneak peek” on Vimeo (<http://vimeo.com/11465235>).

Vimeo’s Revenue

13. Vimeo’s revenue is derived primarily from two sources: user subscription fees and advertising sales. The large majority of Vimeo’s revenues are derived from sales of subscriptions. The remaining revenue comes from advertising sales and other transactions.

14. Vimeo offers consumers basic (free) membership and paid subscriptions. “Basic” members are able to upload a maximum of 500 megabytes of video content, including one high-definition (“HD”) video per week, and receive basic website and video customization options.

15. Users can also purchase a “Vimeo Plus” subscription for \$9.95/month or \$59.95/year. Vimeo Plus subscribers enjoy, among other things, the following benefits: unlimited HD uploading, 5 gigabytes of video upload space per week, priority uploading, optional original file storage and downloading, unlimited HD embedding capabilities, advanced customization options for the website and video player, and advanced statistics. In addition, Plus subscribers do not see display advertisements when they view the Vimeo website.

16. In 2011, Vimeo added a subscription plan that caters to entities that use Vimeo for commercial or business purposes. These entities can purchase a “Vimeo PRO” subscription for

\$199.00/year. In addition to enjoying certain of the benefits of a Vimeo Plus subscription, Vimeo PRO subscribers can upload commercial content and have greater customization options.

17. To a lesser extent, Vimeo generates revenue through advertisements on its website. Most of the advertising revenue comes from “display advertising.” This generally takes the form of banner advertisements and promotions through blog posts and “inbox” notifications (the part of the website registered users see when they first log in). Notably, Vimeo does *not* place ads within videos—either before the video (*i.e.*, a “pre-roll ad”), while the video is playing (*i.e.*, an “overlay ad”), or after the video ends (*i.e.*, a “post-roll ad”). In fact, in most cases, when a video plays, regular display ads are not visible “above the fold” (the part of the page visible on a standard computer monitor). Vimeo generally receives payment for display advertising based upon the number of advertising impressions delivered. Vimeo’s current and former advertisers include companies such as Canon, Coca-Cola, Frito-Lay (for Tostitos®), Honda, Mercedes-Benz, Nike, Nikon, Nokia, Proctor & Gamble (for Old Spice), Rolex, and The Sundance Channel.

18. A smaller portion of Vimeo’s advertising revenue comes from Vimeo’s use of Google’s AdSense advertising program. This program displays sponsored listings (*i.e.*, text plus a link to the advertiser’s website) on Vimeo’s website. The sponsored listings are never adjacent to a video that is playing and usually appear well “below the fold” (if they appear on a page at all). Google’s proprietary algorithms determine what sponsored listings should be displayed on the website. Google pays Vimeo if and when users click on those sponsored listings.

19. Finally, a small portion of Vimeo’s revenues come from other transactions. Most of this transactional revenue comes from the selling of music licenses. As of September 2011, Vimeo began selling music tracks and licenses through its “Music Store.” The Music Store

(publicly available at <http://vimeo.com/musicstore>) allows users to easily find inexpensive licenses to incorporate music into their videos. Vimeo's paid license partners are Audiosocket and SmartSound. Vimeo receives a percentage of the license fees. Vimeo users can also obtain access to music licenses at no cost through Vimeo's partnership with Free Music Archive, a non-commercial online library of music based on the Creative Commons licensing framework.

20. None of Vimeo's revenue streams favor videos that are unauthorized or infringing.

Copyright and Terms of Service Compliance

21. Through the use of moderator tools (or "Mod Tools"), Vimeo deletes videos and, where appropriate, terminates accounts that violate Vimeo's Terms of Service.

22. While Vimeo's staff makes a concerted effort to remove content from the website that does not comply with Vimeo's Terms of Service, Vimeo does not prescreen videos before they are uploaded. Such an undertaking would be impossible. In December 2009, Vimeo had fewer than 20 full-time employees with a wide range of responsibilities. Currently, Vimeo has 74 full-time employees. Of these employees, 16 are assigned to the Community team, which is responsible for, among other things, assisting users and enforcing the Terms of Service. It would not be possible for this group to review even a fraction of the total number of videos uploaded to Vimeo each day, nor would it be financially practicable for Vimeo to hire the large volume of staff that would be required to review each video before it is displayed on the website.

23. Occasionally, I receive hard copy DMCA takedown notices that are sent to Vimeo via U.S. Mail. When I receive these notices my practice is to have them sent to Vimeo's in-house counsel.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

DATED: September 7, 2012
New York, New York


Dae Mellencamp